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October 24, 2007

VIA ELECTRONIC FILING

Ms. Amy Blankenship
Legal Advisor to Commissioner Tate
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **Ex Parte Presentation; Exclusive Service Contracts for the Provision of Video Services in Multiple Dwelling Units; MB Docket No. 07-51**

Dear Amy:

We have appreciated -- and we have done our best to answer -- the questions that you and Commissioner Tate have asked during the course of your deliberations regarding the "MDU" proceeding, and we will do our best to answer any additional questions that may arise. With your indulgence, I would like to ask you to think about this in a different way for a moment.

Put aside the fact that Congress did not give the FCC any authority to take any actions with respect to MDU-MVPD relationships, choosing instead to leave these matters to the States;

Put aside the fact that consumers enjoy enormous benefits as a result of exclusive access agreements;

Put aside the facts that the Commission found several years ago that MVPDs compete intensely to serve MDUs, that the Bells have been free to enter the video business for more than a decade, and that the Bells have adduced no credible evidence to support claims of an accelerated effort by cable companies to "lock up" MDUs with exclusive access agreements;

Put aside the fact that adopting a rule that prohibits cable companies -- but not satellite companies, satellite master antenna systems, or private cable operators -- from entering into exclusive access agreements would badly distort competition, in direct contravention of the Commission's repeatedly-professed and long-standing commitment to "competitive and technological neutrality"; and

Put aside the fact that the Commission's inside wiring rules date from another era, are inconsistent with today's technology and marketplace, and will become even more anomalous if the Commission prescribes new rules governing MDU-MVPD relationships.

Now, with all of that put aside, I would ask you to consider how this rulemaking will affect the institution of contracts -- not just in this case, but more generally -- and how that will affect the kinds of investment that the Commission and the Congress wish to promote to ensure maximum investment in and availability of broadband networks.

As you surely recognize, contracts are part of the bedrock upon which a sound economy must be built. By enabling two parties with differing assets, resources, objectives, etc. to create legally enforceable obligations for mutual benefit, contracts are essential to enable economic activity. Only because promises are secure, and enforceable, can parties trust that the promises each has made to the other will be kept. And only on this basis can parties raise and invest the enormous sums needed to build and maintain the facilities needed for a modern communications infrastructure.

Indeed, it was on this basis that debt-laden cable companies borrowed and invested the more than \$110 billion that enabled them to offer American consumers hundreds of channels of diverse programming, video-on-demand, the first residential high-speed Internet service, the first facilities-based alternative to monopoly voice services, and many other products and services. It was on this basis that phone companies responded to this competitive challenge with investments of their own. It was on this basis that wireless networks were started and built out, and satellites were launched, and undersea cables were laid. All of these activities, and many others that are producing enormous benefits for consumers, occurred in an environment in which mutual promises would be kept, through the enforceability of contracts.

Security of commitment is paramount to parties making contracts. In the case of MDUs, large capital outlays must often be made to provide service to MDU residents, or to increase the quality and variety of services that are available. Sometimes, in exchange for exclusivity that makes the investment attractive, the MDU gets special service and pricing terms. The contracts that exist between MVPDs and MDUs represent these parties' own informed assessments of the terms -- including exclusivity and duration -- they believe are appropriate to make the capital outlays and business plan attractive. Because the parties voluntarily entered into the transaction, it follows that both the MVPD and MDU believed the transaction to be beneficial. If these contracts are abrogated, the parties' calculus is destroyed and the mutual benefit is not seen. If these terms are not honored, or are abrogated, then the investment-backed expectations of the contracting parties are defeated.

And so, even if the Commission had clear legal authority to adopt a prohibition on exclusive contracts for the provision of video service in MDUs, even if the factual record justified adoption of such a prohibition, and even one could somehow rationalize a public policy that will allow some video providers -- but not their direct competitors -- to enter into exclusive access agreements, one would hope that the agency would think long and carefully before

abrogating any existing contracts -- or prohibiting the enforcement of any material terms thereof, which amounts to the same thing.¹

In so doing, you will want to take a long-term perspective. If legitimate marketplace agreements cannot be relied upon, due to the threat of subsequent abrogation by the Commission, the prospects for investments and innovation will inevitably diminish; costs of capital will rise to reflect the increased uncertainty; and prices will inevitably rise to reflect that. Some investments and their attendant benefits will be forestalled altogether. This would be contrary to economic logic and it would thwart national communications policy. As the nation continues to make broadband a national priority, *more* investment in networks, as is made possible by these contractual arrangements, should be the goal.²

The long-term effects of abrogating contracts will also be detrimental to consumers. If and to the extent that parties fear Commission abrogation of their contracts, then parties will seek other ways to enforce commitments or other means of revenue recoupment, or, worst of all, the investment will not take place at all. This harms consumers, as well as the parties to the contracts. In other words, abrogability disproportionately discourages contracts that require substantial long-term investments -- like upgrading apartment wiring to support broadband services.

Were the Commission to demonstrate an increased willingness to abrogate contracts, it would reward regulatory gamesmanship, and invite more of the same. A fundamental purpose of contract law is to deter contracting parties from engaging in opportunistic behavior vis-a-vis one another.³ If each party can rely on the other's performance, then investment can happen and service can be delivered. Here, by even considering abrogation of lawful private contracts, the Commission actually encourages opportunistic behavior that in turn provokes both offensive and

¹ None of this is intended to suggest that regulation cannot change the status quo in ways that are contrary to parties' expectations. That is the nature of regulation, after all. But there is a reason why "grandfathering" is a common feature of both legislative and administrative actions. It is because it is inherently unfair for the government to disturb undertakings that were, at the time they were covenanted, lawful. While organizations that operate in a regulated industry unquestionably must deal with some uncertainty due to the possibility that the law may prospectively change in adverse ways, they are also entitled to expect that their lawful contracts will not be altered *ex post facto* by their government, at the very least, without a very clear expression of authority, compelling demonstration that changed circumstances require it, and compensation for their loss. The expectation interests here are all the stronger given that, after an exhaustive review of the matter, the Commission in 2003 "resolve[d]" these issues with a determination that it would not intervene in this marketplace. *See In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, First Order on Reconsideration and Second Report and Order*, 18 FCC Rcd 1342 ¶¶ 58, 70 (2003).

² See Richard A. Posner, *Economic Analysis of Law* § 4.1, at 102 (Aspen 5th ed. 1998) ("[T]he absence of legally enforceable rights [of contract] would bias investment toward economic activities that could be completed in a short time; and this would reduce efficiency.").

³ *Id.* at 103.

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defensive measures by the contracting parties. Furthermore, it creates incentives to lobby the FCC for, or against, abrogation. Because this market exhibits no imperfections that warrant regulatory intervention, this sort of Commission involvement in private relationships is -- as any good economist will tell you -- pure deadweight loss.

For all these reasons, the FCC should approach privately-negotiated agreements with great deference and humility.⁴ Our market system of private investment rests on parties' abilities to enter into contracts and enforce legal commitments. By changing the contract rules in mid-stream as is contemplated here, the FCC would chill investment, defeat expectations, and harm consumers.

We would be glad to discuss this further with you.

Respectfully submitted,

/s/ James L. Casserly

James L. Casserly

Counsel for Comcast Corporation

cc: Marlene Dortch
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⁴ From the outset of her tenure, Commissioner Tate has stressed the importance of "regulatory humility." See, e.g., Commissioner Deborah Taylor Tate, Closing Remarks at the Accenture Global Convergence Forum 2006, Beijing, China, at 3 (May 12, 2006) (also stressing importance of "light regulatory touch," regulatory fairness, and encouraging investment; *see id.* at 3-4), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DOC-265423A1.pdf.